

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

IN RE

AIR CARGO SHIPPING SERVICES  
ANTITRUST LITIGATION

MDL No. 1775

06-MD-1775 (BMC)

THIS DOCUMENT RELATES TO:  
All Actions

**MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION  
FOR FINAL DISBURSEMENT OF AIR CARGO SETTLEMENT FUNDS**

Pursuant to Class Plaintiffs' November 1, 2018 letter to the Court (ECF No. 2511), Class Plaintiffs seek the Court's authorization to complete final disbursement of residual funds from all prior settlements in this action.

# **I. BACKGROUND**

During the last round of settlement disbursements, the Court authorized distribution of \$24,410,243.11 from the Air Cargo 5 settlements as well as \$900,000.73 in residual funds from the El Al settlement payment to Air Cargo 3 claimants and \$233,134.79 in residual funds from the Air Cargo 2, 3, and 4 settlements. Order Authorizing Additional Distribution of Air Cargo 2, Air Cargo 3, Air Cargo 4, and Air Cargo 5 Settlement Funds, entered March 26, 2018 (ECF No. 2509) ("March 2018 Distribution Order") at 3. The Court-appointed claims administrator, Garden City Group ("GCG"), has completed those distributions. Declaration of Eric Kierkegaard Regarding Funds Remaining after Distribution of Air Cargo 2, Air Cargo 3, Air Cargo 4, and Air Cargo 5 Settlement Funds, dated November 29, 2018 ("Kierkegaard Dec.") ¶ 3. After extensive efforts to reach all class members who had not cashed their checks, there remains a balance of \$14,821.34 in uncashed settlement checks.<sup>1</sup> *Id.* ¶ 4. In addition, the Polar escrow account has accrued \$21,483.54 in income since the calculation of awards for the prior settlement distribution. *Id.* ¶ 5. And nominal amounts, totaling \$15.68, remained in the Singapore Airlines and Cathay Pacific Airways escrow accounts. *Id.* Thus, there is \$36,320.56 in remaining, unallocated settlement funds. *Id.*

Previously, the Court awarded \$194,564.54 to GCG for outstanding and anticipated notice and administration costs, including tax preparation expenses. March 28 Distribution

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<sup>1</sup> This amount differs from the \$20,385.76 reported in Class Plaintiffs' November 1, 2018 letter to the Court because GCG was successful in reissuing checks totaling \$5,564.42 to class members, bringing the total amount of uncashed checks down to \$14,821.34. *Id.* ¶ 4.

Order at 3; Declaration of Lori L. Castaneda Regarding Residual Funds and Additional Installments Available for Distribution, dated March 7, 2018 (ECF No. 2508-2) (“Castaneda Dec.”) ¶ 11. There remains \$2,217.65 of those allocated funds. Kierkegaard Dec. ¶ 6. GCG anticipates that it will require an additional \$9,782.35 to complete settlement administration, including remaining class member communications, banking and project management, and ongoing use and maintenance of the settlement databases. *Id.* As to taxes, the Court previously allocated \$2,000 for payment of Polar tax expenses in 2019, which remains in reserve and will be spent on those expenses in 2019. March 28 Distribution Order at 3; Castaneda Dec. ¶ 11. In addition, GCG expects that any remaining tax preparation fees and expenses will be offset by an anticipated tax refund, so there are no remaining tax costs to be allocated. Kierkegaard Dec. ¶ 7.

To finalize administration of the settlements, Class Plaintiffs request that the Court allocate to GCG \$9,782.35 of the \$36,320.56 in unallocated settlement funds to cover final administration costs. Should the Court approve GCG’s final administration costs, once administration is complete, only \$26,538.21 would remain in the settlement fund. *Id.* ¶ 9. Because it is financially impracticable for Class Plaintiffs to make an additional distribution to class members (*id.* ¶ 8), Class Plaintiffs request a *cy pres* distribution of the remainder of the settlement fund after payment of GCG’s final administration costs.

## II. ARGUMENT

### A. *Cy Pres* Distribution of the Remaining Settlement Funds Is Warranted.

Pursuant to the *cy pres* doctrine, the Court has broad equitable power over the distribution of settlement proceeds. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 146 (2d. Cir. 2005). Indeed, one court has noted, “[T]he *cy pres* approach is most frequently used for the purpose of distributing the residue of a class settlement fund[.]” *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 523 (D. Md. 2002). *Cy pres* payments are appropriate

“where the amount to be distributed to the remaining class members is small relative to the administrative costs of a direct distribution.” *In re Visa Check/MasterMoney Antitrust Litigation*, 2011 WL 5029841, \*8 (E.D.N.Y. Oct. 24, 2011), quoting *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 343 (E.D.N.Y. 2010). Here, the claims administrator estimates that it would cost more than \$33,400 to complete an additional distribution. Kierkegaard Dec. ¶ 8. That cost is greater than the \$26,538.21 that would remain to be distributed after a final payment to GCG for settlement administration costs. Therefore, the most appropriate use of the remaining settlement balance is a *cy pres* distribution.

**B. Class Plaintiffs Propose a Cy Pres Distribution to the International Federal of Freight Forwarders Associations.**

This case sought recovery for direct purchasers, most of whom were freight forwarders, from more than 30 international air cargo carriers for fixing prices of air cargo worldwide on shipments to or from the United States, but not within the United States. Class Plaintiffs propose a *cy pres* distribution to the International Federation of Freight Forwarders Associations (“FIATA”). Its website (<https://www.fiata.com> (Exhibit A)) describes FIATA:

FIATA, the International Federation of Freight Forwarders Associations, was founded in Vienna, Austria, on May 31<sup>st</sup> 1926. It is a non-governmental organization that today represents an industry covering approximately 40,000 forwarding and logistics firms, employing around 10 million people in some 160 countries. FIATA has consultative status with the Economic and Social Council (ECOSOC) of the United Nations (inter alia ECE, ESCAP, ESCWA, etc.), the United Nations Conference on Trade and Development (UNCTAD), and the UN Commission on International Trade Law (UNCITRAL) as well as many other UN related bodies, e.g. the World Bank. It is recognized as representing the freight forwarding industry by many other governmental organisations, governmental authorities, private international organisations in the field of transport and logistics, such as the European Commission (through CLECAT), the International Chamber of Commerce (ICC), the International Air Transport Association (IATA), the International Union of Railways (UIC), the International Road Transport Union (IRU), the World Customs Organization (WCO), the World Trade Organization (WTO), etc.

Among its activities, FIATA has created documents and forms to establish uniform standards worldwide. *Id.* For example, on October 3, 2018, it published a Best Practice Guide on demurrage and detention in container shipping. *Id.*

Courts often grant *cy pres* awards to entities “whose goals are related in some way to the subject of the litigation.” *Schwab v. Philip Morris USA, Inc.*, 2005 WL 3032556, \*3 (E.D.N.Y. Nov. 14, 2005); *see also Godson v. Eltman, Eltman, & Cooper, P.C.*, No. 1:11-CV-764 EAW, 2018 WL 5263071, at \*13 (W.D.N.Y. Oct. 23, 2018) (quoting *Sewell v. Bovis Lend Lease, Inc.*, No. 09-CV-6548 (SHS) (RLE), 2013 WL 1316015, at \*2 (S.D.N.Y. Mar. 29, 2013)) (“Courts routinely approve *cy pres* designations where the purpose of the organization is related to the purpose of the lawsuit.”). FIATA benefits international freight forwarders who were the principal beneficiaries of this litigation. Distribution of the remaining funds to FIATA will inure indirectly to the benefit of most class members thereby serving as the “*next best* compensation use, *e.g.*, for the aggregate, indirect, prospective benefit of the class.” *Masters v. Wilhelmina Modeling Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007), *quoting* Herbert B. Newberg & Alba Conte, 4 *Newberg On Class Actions* § 10:17 (4<sup>th</sup> ed. 2002). Therefore, in order to serve the goals of the *cy pres* doctrine, Class Plaintiffs recommend a proposed distribution to FIATA.

### **III. CONCLUSION**

For the foregoing reasons, Class Plaintiffs respectfully request that the Court authorize disbursement of \$9,782.35 to Garden City Group for administration costs and any remaining funds to FIATA as a *cy pres* distribution. A proposed order is submitted herewith.

Dated: November 30, 2018

Respectfully Submitted,

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# **EXHIBIT**

# **A**



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The FIATA World Congress will be hosted in Cape Town, South Africa and will bring together global leaders, a comprehensive programme and sessions by industry leaders, presenting innovative and relevant discussions. Cape Town is one of the most beautiful cities in the world with a fascinating blend of cultures, flavour and history. The city is known for its harbour, natural setting in the Cape Floristic Region, and for landmarks such as Table Mountain and Cape Point. The 2019 Congress theme is **"Where Technology and Logistics Meet"** and the Congress Programme will focus on new technology and disruptive innovation and how this affects the Logistics and Freight Forwarding Industry worldwide.

## FIATA Documents

FIATA has created several documents and forms to establish a uniform standard for use by freight forwarders worldwide. The documents are .....

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## IATA FIATA AIR CARGO PROGRAM (IFACP)

FIATA and IATA have reached an important agreement on a new jointly-managed air cargo program.

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## Documents

FIATA has created several documents and forms to establish a uniform standard for use by freight forwarders worldwide. The documents are easily distinguishable as each has a distinctive colour and carries the FIATA logo which can be seen at the head of this page.

- FIATA FCR (Forwarders Certificate of Receipt)
- FIATA FCT (Forwarders Certificate of Transport)
- FWR (FIATA Warehouse Receipt)
- FBL (negotiable FIATA Multimodal Transport Bill of Lading) [List of issuing Associations](#)
- FWB (non-negotiable FIATA Multimodal Transport Waybill) [List of issuing Associations](#)
- FIATA SDT (Shippers Declaration for the Transport of Dangerous Goods)
- FIATA SIC (Shippers Intermodal Weight Certificate)
- FFI (FIATA Forwarding Instructions)

FIATA documents have an excellent reputation and are recognised as documents of tradition and trust. They have greatly contributed in the past to the facilitation of international exchanges and will continue in the future to be valuable instruments in the service of world trade.

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## FIATA Publishes Best Practices to Enhance Container Shipping

FIATA Multimodal Transport Institute Working Group Sea is pleased to announce the release of its first "Best Practice Guide" focusing on the charging of demurrage and detention. The guide provides best practices that may help reduce unnecessary supply chain costs and inefficient operations leading to unnecessary detention and demurrage charges.

FIATA acknowledges that demurrage and detention charges are a valid and important tool for shipping lines to ensure that their equipment is being returned as fast as possible and users exceeding the contractual duration of use should be charged accordingly.

However, merchants should not be subjected to unjust and unreasonable charges. In this context, there are strong indications that shipping lines abuse the charging of demurrage and detention to maximise profits. It is understood that shipping lines have been suffering in a very tough business environment and do everything they can to develop revenue streams that are not necessarily derived from freight. FIATA does not believe that forwarders and shippers should be subjected to predatory pricing of this nature, especially as delays often occur through no fault of the forwarder / shipper.

FIATA hopes the guide can provide orientation to its members and all stakeholders as to which conditions are adequate. We also look forward to closer collaboration with shipping lines and the various stakeholders throughout the port supply chain. For access to the newly published guide, please click below:

***Best practice guide 'Demurrage and Detention in Container Shipping':***  
<https://fiata.com/media/documents-for-download.html>

Media Contact:

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### About FIATA

FIATA, the International Federation of Freight Forwarders Associations, was founded in Vienna, Austria on May 31st 1926. It is a non-governmental organisation that today represents an industry covering approximately 40,000 forwarding and logistics firms, employing around 10 million people in some 160 countries. FIATA has consultative status with the Economic and Social Council (ECOSOC) of the United Nations (inter alia ECE, ESCAP, ESCWA, etc.), the United Nations Conference on Trade and Development (UNCTAD), and the UN Commission on International Trade Law.

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(UNCITRAL) as well as many other UN related bodies, e.g. the World Bank. It is recognised as representing the freight forwarding industry by many other governmental organisations, governmental authorities, private international organisations in the field of transport and logistics, such as the European Commission (through CLECAT), the International Chamber of Commerce (ICC), the International Air Transport Association (IATA), the International Union of Railways (UIC), the International Road Transport Union (IRU), the World Customs Organization (WCO), the World Trade Organization (WTO), etc.

For further information, please go to: [www.fiata.com](http://www.fiata.com)

Glattbrugg, 3 October 2018


























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## Position paper

### Public Statements

<a href="#"> Ecommerce Impact International Trade Logistics</a>	(474kB)
<a href="#"> Changing Logistics - Freight Forwarders Evolve with Trade.pdf</a>	(521kB)
<a href="#"> Freight Forwarders, Logistics and the Building Blocks of Free Trade</a>	(545kB)
<a href="#"> SDG Mapping for Logistics Connectivity</a>	(485kB)
<a href="#"> The Keys to Unlocking Africa</a>	(382kB)
<a href="#"> CONGRESS Special Edition - Position Papers 3</a>	(990kB)
<a href="#"> GPST Input - FIATA's Training Initiatives</a>	(410kB)
<a href="#"> Position Paper D'ILF FIATA CLECAT</a>	(350kB)
<a href="#"> FIATA responds to ICAO's Secretary General - Trends, development and challenges facing the airfreight industry</a>	(298kB)
<a href="#"> FIATA Statement - The Need to Assess Connectivity Measure for Freight Transport</a>	(105kB)
<a href="#"> FIATA's Feedback on the Post 2015 Zero Draft Outcome document - <u>Chaired by Logistics Connectivity's Sustainable Energy</u></a>	(389kB)
<a href="#"> FIATA Five Key Statements - Sustain your Future with Logistics</a>	(201kB)
<a href="#"> THE TRADE FACILITATION AGREEMENT Main instrument of development for better global trade</a>	(59kB)
<a href="#"> UN HLPF Open Letter - Logistics Connectivity in the quest for Sustainable Development</a>	(145kB)
<a href="#"> 2015 ICC Trade Facilitation Symposium - FIATA Speech on Trade logistics and Customs Regimes boosting regional and global supply chains</a>	(708kB)
<a href="#"> IMO/ILO/UNECE Code of Practice for Packing of Cargo Transport Units (CTU Code)</a>	(152kB)
<a href="#"> Non Proliferation UN 1540 RESO speech 21 11 2014</a>	(311kB)
<a href="#"> FIATA helps the OWG to design sustainable future</a>	(267kB)
<a href="#"> Every one wins by maximising "de minimis" harmonisation</a>	(100kB)
<a href="#"> Revisiting the Yamoussoukro Decision</a>	(256kB)
<a href="#"> Role of freight forwarders and logistics in intermodal transport chains</a>	(556 kB)
<a href="#"> Combining the OWG's Focus Areas in a Holistic Manner with Trade Facilitation</a>	(146 KB)
<a href="#"> FIATA Insight into SDGs in Preparation for the Secretary General's address to the Open Working Group</a>	(139 KB)
<a href="#"> IATA-FIATA Joint Position on the need for States to ratify the Montreal Convention 1999 MC99 to promote trade facilitation</a>	(110 KB)
<a href="#"> UN Commission on Sustainable Development Open Letter - Logistics connectivity on the main goals for sustainable development</a>	(173 KB)

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### Airfreight Institute (AFI)

 [FIATA Position Paper - E-Freight - October 2009 \(28 KB\)](#)

### Customs Affairs Institute (CAI)

 [FIATA's comments on WCO draft Customs - Tax Cooperation Guidelines](#) (22)

 [FIATA Position Paper WCO Unique Consignment References UCR 27 JUNE 2012](#) (72)

 [FIATA Position Paper - Dual Filing approach on the Advance Security Declaration in accordance with the WCO Safe Framework of Standards - March 2012](#) (81)

 [FIATA Position Paper - Intellectual Property Rights - September 2010](#) (37)

 [FIATA Position Paper - Transit Freedom in WTO Doha Trade Facilitation negotiations - submitted to the World Trade Organization - WTO - July 2010 \(26](#)

### Advisory Body Dangerous Goods (ABDG)

 [FIATA Position Paper - Global Harmonisation 2007 - 2008 \(37 KB\)](#)

### Multimodal Transport Institute (MTI)

 [FIATA Position Paper - on the Mandatory Verification of Container Weights](#) (301 KB)

 [FIATA Position Paper - CO2 and other Emissions in Freight Transport and Logistics](#) (426 KB)

 [Joint FIATA CLECAT-Position Paper on the Communication on a sustainable future for transport \(114 KB\)](#)

## Initiatives

From this table, you are able to see the latest initiatives taken by FIATA

Initiative name	Description	Link
IATA-FIATA Air Cargo Program (IFACP)	Freight forwarding companies operated within the IATA Cargo Agents' rules for several decades; their services gradually evolved in time from being "selling-agents" for the airlines' services to becoming their purchasing customers. IATA and FIATA having joined forces to review, refine and re-engineer this Agency Program to reflect these changes, the IATA FIATA Air Cargo Programme was adopted by both organisations in 2016. The brand new program moves decision-making on the rules governing the airline-forwarder relationship to a governance body jointly managed by forwarders and airlines, which reflects today's market conditions. For full information on the IATA-FIATA Air Cargo Program please use the Link: <a href="#">Find out more</a> .	<a href="#">Find out more</a>
FIATA Logistics Academy	The FLA (FIATA Logistics Academy) is a Standing Committee of FIATA working to help promote education and training in freight logistics and other top priority FIATA deliverables.	<a href="#">Find out more</a>
World Congress 2017	The next FIATA World Congress will take place on the 4th - 8th October 2017 in Kuala Lumpur / Malaysia. <a href="#">Registration is available now</a> .	<a href="#">Find out more</a>
FIATA's New Members	We are pleased to present the following list of companies who have recently joined FIATA's <a href="#">ranks</a>	<a href="#">Find out more</a>

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